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SUPREME COURT, U.S.

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No. 06-704

IN THE SUPREME COURT OF THE UNITED STATES

Nicholas Sabo

Petitioner

v.

State of Ohio

Respondent

On Petition for a Writ of Certiorari

To the Supreme Court of Ohio

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1a. The presumption in question involves an element of the offense.

It strains credulity to argue that conclusively presuming the general reliability of the breath test does not involve the establishment of an element of the offense.

There are two ways to be convicted of drunk driving in Ohio. The first is for the defendant to have a prohibited concentration of alcohol. The state must establish this element and the sole way of doing this is by testing bodily substances for alcohol. The general reliability of the testing machine is an absolutely necessary ingredient in proving this element. Thus, presuming the general reliability of the testing machine is a direct and essential part of establishing an element of the offense. As such, it cannot constitutionally be presumed.

The second way to be convicted of drunk driving in Ohio is the old fashioned way of proving that alcohol affected the defendant's ability to operate a vehicle. In *voir dire* it was established that all of the jurors felt that if one failed the test that meant not just that he was over a certain level, but it also meant that the he was under the influence. Trial Transcript, p. 85 l. 13-88 l. 22.

Thus, for all practical purposes presuming the general reliability of the testing machine is a direct and essential part of establishing this element of the offense as well. As such, it cannot constitutionally be presumed.

In a certain sense, the Respondent is correct when on page 11 of its brief it contends that "Petitioner conceded that the statutory scheme did not shift a burden of proving guilt..." Without delving more deeply into the peculiarities of Ohio law than is necessary for these purposes, suffice it

to say that the statute does not create a conclusive presumption of guilt. That presumption was created by the Ohio Supreme Court in *State v. Vega*, (1984) 12 Ohio St.3d 185, not by the legislature. While the former (before 1983) statute had presumptive language, the one the Petitioner was charged with does not. The Ohio conclusive presumption is a judicial creation.

Judicial conclusive presumptions are, nevertheless, just as unconstitutional as legislative ones. Petitioner has consistently and vigorously raised the mandatory conclusive presumption issue at every level. The Respondent has not uncovered any startling new admission or change in position. Petitioner's remark was merely misconstrued.

b. *Miskel v. Karnes* is inapposite.

There are several reasons why *Miskel v. Karnes* (2005) 397 F.3d 446, does not apply to this case. To begin with, *Miskel* was decided under the recently amended federal *habeas corpus* law.

Under the new legislation, the federal court's ability to correct injustice in *habeas corpus* cases has been severely limited. The mere fact that the federal court disagrees with the state court or that it would have decided differently is not enough. As the court put it:

> We may only overturn the district court and grant a writ of habeas corpus if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

Id, 451. A state court decision that is contrary to a federal circuit court decision or which is an unreasonable application thereof is not actionable under the act. There must be a United States Supreme Court decision on the issue. Furthermore, and more importantly, lower federal courts must generally defer to state court interpretations of state law: "... we re-emphasize the significance in this case of the highly deferential AEDPA standard of review... *Id,* 458.

In addition, the standard of review in *Miskel* was so narrowly restricted that Supreme Court *dicta* supporting her position was insufficient. "The second flaw with Petitioner's reading of *Trombetta* is that it is based on *dicta*, rather than the Court's holding, " *Id,* 455. Thus even if the court felt that what happened to Ms. Miskel was unconstitutional and even if it believed that the United States Supreme Court was of the same opinion, this would not be a sufficient basis to grant relief under AEDPA.

The nonbinding *dicta* from the United States Supreme Court decision in *California v. Trombetta,* (1984) 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 which the *Miskel* court cited but could not follow was this:

> ...a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were truly prone to erroneous readings, then *Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt.*
>
> *Id.* at 489 n.10 (citing Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560 (1979).

Miskel, supra, 454, (emphasis added).

As a result, a holding that an AEDPA claim was not established in *Miskel* is not the same thing as a holding that the alcohol testing processes used in the case at bar is acceptable. Nor is it even an indication as to the federal court's views of the way that this Court might decide the case or indeed the way the Sixth Circuit might decide the matter if confronted with the issue directly rather than in the context of an AEDPA claim.

Another problem with *Miskel* as precedent in the case at bar is that there is also a critical factual distinction between *Miskel* and the instant matter. In the case at bar, the only evidence submitted to the jury regarding the element of a prohibited concentration was the mere test result. In *Miskel*, the jury heard both direct testimony and cross-examination on this issue.

While this was not clear from the appellate opinion, the district court opinion demonstrates this:

> ...Petitioner was permitted to cross-examine the officer who operated the BAC Verifier concerning the specific administration of petitioner's test. The officers were further subject to cross-examination concerning their knowledge of the functioning of the BAC Verifier on the night in question, and compliance with the applicable Department of Health Rules and Regulations. Officer Wetzel was also allowed to answer questions about an earlier calibration of the BAC Verifier which was determined not to be within the acceptable tolerance level. Transcript, pp. 155-158. Petitioner's counsel then used the information gleaned from the cross-examination

> to argue in his summation to the jury that the results of the specific test were not reliable.

Miske vs. Karnes (S.D. Ohio 2003), Case No. C2-01-98, unreported p. 11-12.

A further problem with *Miskel* is the federal court's misperception of the practicability of using Ohio civil declaratory judgment law as a device for asserting innocence in a criminal case. The magistrate that originally heard the case in *Miskel* apparently did not know a lot about what would happen if redress of the constitutional infirmities in Ohio's breath testing law were to be addressed in a civil declaratory judgment matter rather than in the criminal case itself.

To begin with, the defendant would become the plaintiff in such a civil action and would therefore bear the burden of proof. The defendant should not have to unconstitutionally assume the burden of proof in a civil case in order to prove his innocence in a criminal one. The standard, would most likely be the abuse of discretion standard, which is a very difficult standard to meet. Not only would the burden of proof be shifted, but an extremely difficult burden to meet would be placed on the defendant in order to prove his innocence in a criminal case.

As a practical matter, a civil declaratory judgment action in a Court of Common Pleas civil case is almost always going to take longer than an OMVI case in Municipal Court. The municipal case would be over with before innocence could be established and the appeal time would have run. If the federal court in *Miskel* thought this would be an effective remedy it either did not know much about state court procedure or it did not think things through carefully.

c. Striking down the unconstitutional presumption will not subject the laws of physics to defense challenges.

It is not a law of physics that the BAC Datamaster has a flawless sample collection design. Nor is this factually true. The unconstitutional presumption created in *Vega* has the net effect that under Ohio law design defects cannot be raised once the machine has been approved by the retired police officer without scientific credentials who works for the Department of Health.

The design defect in the sample collection mechanism applies to all BAC Datamaster machines. Thus raising such a challenge is a challenge to the general reliability of an approved testing machine and is forbidden under *Vega*. Allowing challenges to the sample collection mechanism of the BAC Datamaster will not force courts to reconsider whether a feather and a hammer fall at the same speed in a vacuum or to revisit the first law of thermodynamics.

The scale analogy provides an illustration of why a general challenge to an approved testing machine does not, of necessity, entail an assault upon the laws of physics. If the dial on a particular scale stuck at 240 pounds that would be a specific challenge. If no scale of that manufacturer had a dial marking over 240 pounds, that would be a general challenge to the approved machine. Since general challenges are prohibited, perfectly valid and truthful evidence would be barred.

It would not be an assault on the laws of physics or those of weights and measurements to show that all approved scales including the one used are incapable of weighing a 275 pound defendant accurately. If the defendant's only defense was that he weighed more than

the machine could measure, giving him the option of presenting the nonexistent defense that the scale dial on his particular scale was stuck would not cure the illegal presumption. Nor would it keep the jurors from wrongfully concluding that the defendant weighted 240 pounds rather than 275.

If *Vega* is overturned, the only result will be that for the first time in a generation, a defendant will be able to have an actual trial in an Ohio drunk driving cases rather than just the pretense of a trial. While it may seem like a quagmire to the Respondent not to have the only contested issue in the case conclusively presumed in favor of the state, that is the price of justice. What is happening now in Ohio is not justice.

d. The evidence the petitioner attempted to present could not have been deficient because he had no burden to present evidence in the first place.

A mandatory conclusive presumption does not become constitutional because a defendant does not assume a burden of proof that has been unconstitutionally thrust upon him. Ohio's complaint that there was a failure of proof on the defendant's part only serves to highlight the fact that the burden of proof was unconstitutionally shifted to him.

The Respondent appears to believe that GERD is an affirmative defense. It is not. If GERD is a factor, the argument is that the element of a prohibited concentration has not been established. The prosecution must always bear the burden on this issue. Since even the Respondent admits to some uncertainty as to whether or not GERD is an affirmative defense (BOC 20), there is at least ambiguity on the issue. Such ambiguity must be resolved against the State.

It would actually be an improvement in Ohio law to allow the defendant to assume the unconstitutional burden of proving his innocence since, to date, even this has been denied him. In this respect, the following questions deserves consideration:

Could a reasonable person doubt the result of a test performed on someone who is taking GERD medication where the testing machine has trouble testing people with GERD? If the answer to this question is yes, then evidence which raises a reasonable doubt is being barred. This is unconstitutional under *Holmes v. South Carolina* (May 01, 2006), __- S.Ct. __-, 126 S.Ct. 1727, 164 L.Ed.2d 503. The facts set forth in this question were offered, barred, and proffered.

If this were a civil case where the petitioner was required to establish his case by a preponderance, barring evidence which did not rise to a certain level of likelihood might make some sense. In a criminal case, the defendant does not have to prove that his theory is likely, he does not have to prove that it is true. All he need do is create one reasonable doubt about its veracity. If his evidence does this, the constitution gives him the right to present it.

GERD is one possible reason for the defendant's test result just as alcohol is one of many possible reasons for bloodshot eyes. Allowing the former is no more speculative than allowing the latter.

The trial court's statement cited on paged 21 of Respondent's brief that: "There's a lot of people out there using Zantac... that don't have acid reflux..." is a classic example of the *Holmes* problem of the trial court substituting its personal beliefs for the evidence. The proffer, which must be accepted as true, provides that:

"Zantac is not a drug of abuse and there is normally no other reason to take such medication other than to treat GERD." PWC 30a. The banned evidence was not speculative. It merely conflicted with the court's preexisting beliefs and thus seemed weak for this reason. This was an issue for the trier of fact.

2a. The *Holmes* argument was not waived.

It is hard to understand how the Petitioner is supposed to have waived his *Holmes* claim. Petitioner asserts that he was barred from presenting exculpatory evidence. The evidence in question was offered, barred, and proffered. While *Holmes* itself was not cited below, it had not been decided until the case reached the Ohio Supreme Court. There was no waiver.

b. The *Crawford* argument was not waived.

Respondent is mistaken in its claim that Petitioner waived *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 errors by not raising them in the trial court. Respondent's appellate counsel did not try the case and thus would not have remembered than when the documentary exhibits, which included the test result, were sought to be introduced, counsel for the Petitioner objected and made the following record:

> The United States Supreme Court recently decided Crawford versus Washington dealing with documentary evidence in criminal cases, and they said documentary evidence deprives the defendant of the right to cross-examination and that sort of thing. So we would list as an additional ground Crawford versus Washington. I actually do have the citation on that, I suppose I

should read into the record as well. That is -- It's a new case so there isn't a permanent one, but it's 72 United States Law Week 4229, and it was decided March 8, 2004. And the United States Supreme Court, I have not seen -- oh, it's 124 Supreme Court 1354. There is a Supreme Court cite on that too.

Trial transcript p. 398, l. 21-p. 399, l. 11. PWC 39a.

3a. Respondent apparently concedes that defendant's conviction was supported only by a preponderance of the evidence rather than proof beyond a reasonable doubt.

Respondent is silent as to how the mere test result which was found admissible by only a preponderance of the evidence can rise to the level of proof beyond a reasonable doubt without further proof. Nor does it explain how evidence which was never heard by the jury can be the sole proof of an element of the offense. Presumably Ohio concedes this point. Either defect is a serious constitutional violation and a sufficient reason for reversal.

CONCLUSION

WHEREFORE, petitioner asks that his petition be granted.

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